

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
Case No. 21-11507 (KBO)
ALTO MAIPO DELAWARE, LLC, (Jointly Administered)
et al.,
Courtroom No. 3
824 Market Street
Debtors. Wilmington, Delaware 19801
Tuesday, April 26, 2022
11:01 a.m.

TRANSCRIPT OF ZOOM HEARING
BEFORE THE HONORABLE KAREN B. OWENS
UNITED STATES BANKRUPTCY JUDGE

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1 (Proceedings commenced at 11:01 a.m.)

2 THE COURT: Good morning, parties. This is Judge
3 Owens. We are gathered for an omnibus hearing in Alto Maipo.
4 Can you all hear me?

5 COUNSEL: We can, Your Honor.

6 THE COURT: Okay. Thank you very much.

7 Okay. We're here for an omnibus hearing in Alto
8 Maipo. We have a series of items scheduled to go forward.
9 Why don't I turn the virtual podium over to the debtors and
10 you can walk me through today's agenda.

11 MR. GREECHER: Yes, thanks. Good morning, Your
12 Honor. Sean Greecher from Young Conaway, on behalf of the
13 debtors.

14 We did file yesterday, an amended agenda; it's at
15 Docket Number 537. The amended agenda reflects a few
16 additional matters that were filed by various parties. It
17 also reflects the adjournment of the matters relative to the
18 Manzano community parties. Those matters, Numbers 3 and 4 on
19 this agenda, will be heard on April 29th. And we thank Your
20 Honor for the accommodation in that regard.

21 With that, Your Honor, I would propose to just
22 jump into Matter 1, which is the debtors' motion to assume
23 the Minera Los Pelambres agreement. And for that, I would
24 turn things over to Mr. Barefoot.

25 THE COURT: Okay. Thank you, Mr. Greecher.

1 Mr. Barefoot, welcome.

2 MR. BAREFOOT: Good morning, Your Honor.

3 Luke Barefoot from Cleary Gottlieb Steen &
4 Hamilton for the debtors in possession.

5 Your Honor, as Mr. Greecher mentioned, we have two
6 items on the agenda this morning: the debtors' motion to
7 assume the power purchase agreement with Minera Los Pelambres
8 that was originally filed on March 10th at Docket Item 349
9 and the debtors' related motion to enforce the automatic
10 stay, also filed on March 10th at Docket Item 352.

11 Your Honor, the agreement that these motions
12 relate to, a long-term power purchase agreement with MLP, is
13 central to the debtors' reorganization efforts and is the
14 core of their business plan, as it secures MLP's obligations
15 to purchase power from the debtors' hydroelectric project on
16 favorable, predictable, and long-term terms.

17 In terms of how we would propose to proceed, Your
18 Honor, subject to your views, I would propose to provide a
19 brief introduction on the merits of the assumption motion and
20 take care from an evidentiary perspective, admitting into
21 evidence the testimony that the debtors would rely on in
22 support of the motions, and then turn to the only outstanding
23 objection, which is the personal jurisdiction objections
24 asserted by MLP that have now been extensively briefed by the
25 parties.

1 THE COURT: Okay. I actually do have a problem
2 with that procedure. We're here on just the limited
3 threshold question of whether I can exercise, or excuse me,
4 whether it's appropriate to decide the motions without the
5 presence of MLP, having been decided. So, that's the legal
6 issue that's squarely before me and the merits are not at
7 this point, so I will not move any evidence -- move any of
8 the declarations into evidence at this time.

9 MR. BAREFOOT: Understood, Your Honor.

10 Then, in that light, what I would propose is that
11 the debtors and the parties that are supporting the debtors
12 would begin with argument on the personal jurisdiction
13 question and then turn it over to Mr. Bromley, while
14 reserving reply?

15 THE COURT: That would be perfect. Thank you.

16 MR. BAREFOOT: So, Your Honor, as we set it out at
17 the beginning, the sole issue that is before the Court and
18 the sole objection to entry of the orders is MLP's assertions
19 on personal jurisdiction. And to set the stage there, I
20 would like to begin with the frameworks of Section 365 and
21 541, which are well established. Section 365 requires that,
22 one way or the other, the debtors assume or reject in their
23 business judgment, all executory contracts prior to
24 confirmation.

25 When the debtors exercise that business judgment

1 to assume a contract, the Court is required to determine
2 under Section 365(b), whether there are any defaults under
3 the agreement, and if there are, to provide for cure of those
4 defaults and adequate assurance of future performance.

5 In turn, Section 541 provides that the debtors'
6 estate consist of all legal and equitable interests of the
7 debtor and property, wherever located, and pursuant to
8 Section 1334 of Title 28, the Court is vested with
9 jurisdiction to decide motions to assume, as matters arising
10 under Title 11.

11 While MLP has framed the question before the Court
12 in terms of due process, there can be no question that MLP
13 has had and has what due process requires: notice and an
14 opportunity to be heard. Presented with that opportunity,
15 MLP made the strategic decision not to engage or object with
16 the merits of assumption or the merits of whether a default
17 exists.

18 MLP is a sophisticated party represented by
19 capable counsel and that is their entitlement to make that
20 decision. But what MLP asked the Court to do today is to
21 allow their strategic choice to rely on personal jurisdiction
22 objections to trump the debtors' entitlements under Section
23 365 and to make new law that the Court must engage in an
24 individualized determination on personal jurisdiction every
25 time the debtor exercises its business judgment to assume a

1 contract.

2 There is simply no support in the tomes of case
3 law on Section 365 that squarely supports that assertion.

4 THE COURT: You would agree with me, Mr. Barefoot,
5 that it's a basic of civil procedure that I have subject-
6 matter jurisdiction, but as well, I need jurisdiction over
7 the thing or I need jurisdiction over the person. You would
8 agree with me on that?

9 MR. BAREFOOT: Agreed, Your Honor.

10 THE COURT: Okay.

11 MR. BAREFOOT: I agree. And that is a disjunctive
12 choice.

13 THE COURT: Okay.

14 MR. BAREFOOT: You do not require both. If you
15 have jurisdiction over the thing, you do not require
16 jurisdiction over the person, as you can proceed *in rem*.

17 THE COURT: Okay. So the idea that only MLP is
18 only entitled to notice and an opportunity to be heard is not
19 exactly a correct statement of the law, is it?

20 MR. BAREFOOT: Well, in terms of -- Your Honor, I
21 was framing that in terms of their framing of the issue that
22 this is an issue of due process and that's what due process
23 requires.

24 THE COURT: I think the Fifth Amendment goes to
25 more than notice and an opportunity to be heard, doesn't it?

1 MR. BAREFOOT: That's fair, Your Honor.

2 But I think, turning squarely to Your Honor's
3 question, the Court clearly has jurisdiction here over the
4 thing; the thing being the debtors' rights under the power
5 purchase agreement.

6 THE COURT: Okay.

7 MR. BAREFOOT: And, Your Honor, if I could just
8 elaborate a bit on MLP's position and the practical import
9 they would have, if the Court accepted MLP's assertion
10 foreign counterparties everywhere could effectively tie the
11 Court's hands by making a strategic choice that rather than
12 appear and be heard on the merits, whether it be as to
13 whether there's default, whether it be as to whether there's
14 an integration issue, whether there is cure required, all of
15 those matters, they could avoid a determination on and,
16 instead, rest on personal jurisdiction assertions in an
17 effort to block the debtors' ability to assume what would be
18 an agreement that's beneficial to the debtors' estates.

19 The consequences of that kind of a ruling cannot
20 be understating, particularly, in large cross-border cases
21 such as these. MLP's arguments would transform what is
22 intended to be a summary proceeding under 365, into a complex
23 series of potentially hundreds or even thousands of
24 minitrials, where the Court would be required to make one-by-
25 one determinations on personal jurisdiction with each of the

1 debtors' counterparties. MLP's assertions, if accepted and
2 taken to that logical conclusion, would fundamentally alter
3 the inquiry the Court is required to make and grind the
4 "assumption and rejection" process to a halt.

5 Going straight to, Your Honor, the touchstone for
6 MLP's arguments, it's the Supreme Court's decision in Shaffer
7 v Heitner. Courts have made clear that Shaffer only applies
8 to *quasi in rem* proceedings, not *in rem* proceedings, such as
9 this bankruptcy case, where the Court has core, *in rem*
10 jurisdiction over all the legal and equitable interests of
11 the debtor and property, wherever it's located.

12 As an initial matter, Your Honor, the scope of
13 Shaffer is made clear by the fact that the Supreme Court has
14 gone on to decide two subsequent cases: the 2006 decision in
15 Central Virginia v Katz and the 2004 decision in Tennessee
16 Student Assistance v Hood, where it clearly held that
17 bankruptcy proceedings are fundamentally *in rem* actions,
18 without so much as a citation to Shaffer.

19 THE COURT: You would agree we me --

20 MR. BAREFOOT: Indeed --

21 THE COURT: -- that those cases -- you would agree
22 with me that those cases seem to imply that the *in rem*
23 jurisdiction isn't the starting and endpoint, however. I
24 mean, those cases --

25 MR. BAREFOOT: Well, Your Honor --

1 THE COURT: -- imply that a Bankruptcy Court could
2 overstep *in rem* jurisdiction -- I shouldn't even say, "*in rem*
3 jurisdiction" -- just an *in rem* action is not the start and
4 the end; that there could be an *in rem* action coupled with an
5 *in personam* action.

6 MR. BAREFOOT: There certainly could be, Your
7 Honor, and that would be an example, such as in many of the
8 cases that MLP has cited to where there's an adversary
9 proceeding, there's a request for a declaratory judgment,
10 there is a request for a monetary judgment against the
11 counterparty.

12 But the debtors here are not seeking any of those;
13 the debtors are simply seeking authority to assume the
14 contract in the exercise of their business judgment. And as
15 part and parcel of that, it's a required element of 365 that
16 the Court make a determination about whether defaults exist.

17 THE COURT: Well, the Orion Court would seem to
18 suggest that that's not the requirement and that's not how I
19 should analyze a motion to assume. And other courts that
20 have accepted Orion's position actually disagree with that
21 approach.

22 MR. BAREFOOT: Your Honor, I'd only note on that
23 point that Orion is fundamentally focused on jury trial
24 rights. No one has asserted that jury trial rights are at
25 issue here and, in fact, the Third Circuit in the Billing v

1 Ravin, Greenberg decision, which is at 22 F.3d 1242,
2 criticized Orion and said that the Court did not engage in an
3 in-depth Seventh Amendment analysis and that it found the
4 observations in Orion unpersuasive.

5 THE COURT: Well, wouldn't it have parallels to
6 this proceeding? Orion was concerned with constitutional
7 rights. In that case, the issue was the jury trial, but here
8 it's due process.

9 So how -- yes, while it is not on point, exactly,
10 you can extract the fundamentals from that case and apply
11 them to this case, couldn't you?

12 MR. BAREFOOT: Your Honor, I think if we look at
13 the lower court decisions that apply to Shaffer v Heitner,
14 it's very clear that the courts have drawn a bright-line
15 around *quasi in rem* proceedings and distinguishes them from
16 *in rem* proceedings.

17 If you look at the Ninth Circuit decision in
18 United States v Obaid, it provides a thorough analysis of
19 Shaffer and held and expressed terms that Shaffer is limited
20 to *quasi in rem* proceedings and not *in rem* proceedings, and
21 it expressly gave bankruptcy proceedings as an example of
22 purely *in rem* proceedings.

23 And that's entirely consistent, Your Honor, with
24 the District of Delaware decision in Forest Labs. Forest
25 Labs held, and I'm quoting:

1 Shaffer, however, addressed the vitality of *quasi*
2 *in rem* jurisdiction; it does not address the question of
3 consent to personal jurisdiction, nor the concept of general
4 jurisdiction.

5 And while MLP argues that Forest Labs from the
6 District of Delaware is inapposite because there, the
7 defendant consented to personal jurisdiction, that's not
8 necessary to the Court's holding that Shaffer only applies to
9 *quasi in rem* proceedings.

10 THE COURT: And how would you describe a *quasi in*
11 *rem* proceeding?

12 MR. BAREFOOT: Your Honor, I think Shaffer is the
13 prototypical example, right. As a matter of Delaware law,
14 the shares in that case were located within the District of
15 Delaware, but the parties who owned those shares were not.
16 So, the Court was required to make findings that it could not
17 execute because those parties were not within its
18 jurisdiction.

19 THE COURT: Did the findings seek, did they seek
20 to apply the findings to assets outside of Delaware?

21 MR. BAREFOOT: I don't believe so, Your Honor,
22 because I think as a statutory matter, the shares at issue
23 are, as a matter of Delaware law, always located in Delaware,
24 no matter where they're certificated or who the holders of
25 those shares are.

1 But here, Your Honor, it's not ambiguous and, you
2 know, MLP has made a lot of bones about the fact that this is
3 a contract, that it's intangible rights under a contract,
4 rather than, you know, something like a bank account or a car
5 that is tangible. That is really not consistent with the
6 current concept of the scope of the debtors' property under
7 541. And the case law that we cited makes clear that
8 intangible rights, such as the debtors' rights under the
9 contract with MLP are part of the debtors' estate that is *in*
10 *rem* before the Court.

11 Your Honor, if I could just turn to, very briefly,
12 addressing some of the additional decisions on the Shaffer
13 decision that MLP cited to in its surreply?

14 THE COURT: That would be great. Thank you.

15 MR. BAREFOOT: So, Your Honor, most of the other
16 decisions that MLP cites to in its surreply brief are
17 inapposite because they are *in personam* actions that were
18 either adversary proceedings or district court civil actions
19 where the relief was obviously *in personam*, because it sought
20 a judgment against a defendant.

21 We're not seeking any such a judgment here. As to
22 the Second Circuit's decision that they cite in LiButti --
23 that's L-i-B-u-t-t-i -- v United States. That arose in the
24 context of an action by the IRS to quiet title over property.
25 And the only court holding there was the unremarkable

1 preposition that, as Your Honor observed, the Court either
2 neither *in rem* jurisdiction over the property or it needed *in*
3 *personam* jurisdiction over the defendants. And it held that
4 the property was not within the jurisdiction of the court and
5 that the defendants had a lack of minimum contacts.

6 There's nothing in LiButti that holds or suggests
7 that bankruptcy courts entering assumption orders must also
8 have personal jurisdiction over contract counterparties.

9 Similarly, Your Honor, as to the Fourth Circuit's
10 decision in United States v Batato, and that's B-a-t-a-t-o,
11 the Court was clear that it was only assuming, without
12 deciding, that estate-based, minimum contacts approach was
13 appropriate in civil enforcement actions. Not only is that
14 from outside of the circuit and in a different context, but
15 it didn't actually make a decision about whether Shaffer's
16 minimum contacts analysis applied; it only assumed that it
17 did.

18 Your Honor, I'd like to turn to the two cases that
19 I think are the closest to being on point as to the square
20 question before the Court. On MLP's side, and that's a thin
21 stack, because I think this is, the debtors would concede,
22 relatively unprecedented territory MLP is asking the Court to
23 wade into.

24 On MLP's side, I think the closest they get
25 without actually hitting it on the mark, is the 1983 decision

1 from the Western District of Missouri in the Global
2 International Airways case. In that case, however, Your
3 Honor, the Court does not actually wrestle with the question
4 of whether personal jurisdiction over the contract
5 counterparty was required.

6 The procedural posture of that case was that the
7 parties framed the question for the Court not as whether
8 jurisdiction over the contract counterparty was required as a
9 prerequisite to assumption; instead, the Court only answered
10 the question that was put to it by the parties, which is
11 whether the Court had jurisdiction over Air Canada, as an
12 instrumentality of a foreign state.

13 I'd also note, Your Honor, that that case is
14 almost 40 years old and was decided only a few years after
15 the Bankruptcy Code was enacted and so, it lacked the benefit
16 of the precedent that was developed over the intervening
17 decades.

18 The case that we think is most squarely on point
19 and that the debtors would urge the Court to look to is the
20 one that's before the Court that actually decides the
21 question of whether personal jurisdiction over a lease
22 counterparty is required to enter an assumption order, and
23 that's the more recent decision in Sae Young Westmont from
24 the Northern District of Illinois in 2002. In that case,
25 Your Honor --

1 THE COURT: But that case -- I've read it; I've
2 analyzed it -- I'm not sure if that case is helpful to you
3 because that case just simply asked the Court to decide
4 whether it could assume and assign, whether the debtor could
5 assume and assign a contract.

6 There were no findings that were made in an order
7 about defaults. There were no findings made in an order
8 about cure. You would agree with me that that seems to be,
9 more squarely, the question that I have before me today?

10 MR. BAREFOOT: That's correct, Your Honor.

11 And I don't think there were -- there was a
12 request in that case from the debtor to make those findings.

13 I think we have established -- and I don't think
14 it's controversial -- that that is an element of 365(b)
15 that's a prerequisite to the statute. And that's why the
16 debtors have been asked -- have asked the Court to make those
17 findings.

18 Obviously, if Your Honor was so persuaded, you
19 know, there could be modifications made to the order to
20 comport with Sae Young Westmont. But we do think that,
21 regardless of whether Sae Young Westmont squarely addressed
22 the question of 365(b) cure, Sae Young Westmont does clearly
23 say that the Court does not need jurisdiction over the state
24 counterparty and said that the nature of *in rem* jurisdiction
25 was to determine the disposition of the property and that by

1 doing that and entering an order authorizing an assumption
2 and assignment, there was no way that the Court was
3 transforming the nature of the proceeding into an *in personam*
4 proceeding.

5 THE COURT: How would you --

6 MR. BAREFOOT: And that's the --

7 THE COURT: How would you define what an *in*
8 *personam* proceeding is?

9 MR. BAREFOOT: I would say it's a proceeding where
10 the relief that -- where there is specific relief being
11 sought to require a judgment or performance from the adverse
12 party. And, Your Honor, here, we're simply seeking to, as a
13 matter of 365, assume the agreement because I think we've
14 made the case that it is in the debtors' business judgment to
15 do so.

16 THE COURT: Okay. I understand your position but
17 thank you for answering my -- that last question.

18 MR. BAREFOOT: Just going very briefly back to Sae
19 Young Westmont, you know, I think it's important, Your Honor,
20 that that case also expressly rejected the assertion that the
21 assignment of the lease derived from *in personam* jurisdiction
22 and it, instead, said that the jurisdiction to assume and
23 assign the lease derived from the Court's jurisdiction, not
24 over the state, which was the lease counterparty, but from
25 jurisdiction over the debtors' estate.

1 Your Honor, as I said, the debtors concede that
2 given the relatively unprecedented nature of the holding that
3 MLP seeks, there's not a great deal of case law where courts
4 have directly wrestled with this question. But the debtors
5 would respectfully submit that the closest guidance that the
6 Court has is not only in the cases that expressly distinguish
7 Shaffer v Heitner as only applicable to *quasi in rem*
8 proceedings, but the Sae Young Westmont case, which expressly
9 decides that personal jurisdiction over the contract
10 counterparty was not a prerequisite to entry of an assumption
11 order.

12 THE COURT: Okay. Thank you, Mr. Barefoot, and
13 thank you for the colloquy back-and-forth, via Zoom. It's
14 difficult, quite frankly, to engage in any back-and-forth,
15 but thank you for attempting that with me.

16 All right. I know that other parties have filed
17 joinders in support of the debtors' position and I'm happy to
18 hear from them at this time before I turn the podium over to
19 Mr. Bromley on behalf of MLP.

20 MR. ROSENBLATT: Good morning, Your Honor.

21 It's Andrew Rosenblatt from Norton Rose Fulbright.
22 I'm here on behalf of the senior secured lenders under the
23 common terms agreement.

24 Your Honor, we did file joinders to the debtors'
25 original motion to assume the PPA, the motion to enforce the

1 stay against MLP, and then the debtors' response to the
2 personal jurisdiction, that is the subject of today's
3 hearing.

4 Our latest joinder regarding personal
5 jurisdiction, I believe, is at Docket 526. Your Honor, I'd
6 note that Strabag SpA is also a party to that joinder.

7 I will be brief, as I agree with pretty much
8 everything Mr. Barefoot said. I see no reason to just repeat
9 what he said.

10 To me, though, Your Honor, this is not all that
11 complicated. I think that what MLP has done, because it has
12 to, in order to even make a colorable argument, is to try and
13 turn Alto Maipo's assumption motion into something that it's
14 not. Our view is that the motion is very straightforward;
15 it's simply a motion to assume a contract that is
16 unquestionably property of the estate and property over which
17 the Court, unquestionably, has *in rem* jurisdiction under 28
18 U.S.C. 1334.

19 Importantly, as Mr. Barefoot, I think he alluded
20 to, the debtors are not seeking to amend the PPA. They're
21 not seeking to impose any obligations over MLP that do not
22 otherwise exist under the contract. They're not seeking to
23 modify the PPA in any way, nothing of the sort that would
24 impact or affect MLP's, quote, particularized rights or
25 obligations.

1 And I think that's the distinction; that's when
2 you invoke *in personam* jurisdiction, when you're imposing
3 obligations on a party and you're not just adjudicating, you
4 know, the rights of parties in debtors' property. To me,
5 Your Honor, their argument makes no sense because every
6 assumption motion -- and I stress the word "every" here --
7 requires the same findings. And Mr. Barefoot said it's a
8 statutory requirement under Section 365 for the Court to
9 determine if a default exists.

10 So, how is this motion different than any other
11 assumption motion? It's not and --

12 THE COURT: Because there's a contract
13 counterparty that does not submit to the jurisdiction of my
14 court and --

15 MR. ROSENBLATT: Yeah, but Your Honor --

16 THE COURT: -- and --

17 MR. ROSENBLATT: Yeah?

18 THE COURT: -- every omnibus motion to assume or
19 reject typically does not include findings about defaults and
20 cures -- defaults of -- over parties, when we know there's a
21 dispute.

22 MR. ROSENBLATT: Well, Your Honor, they have the
23 right to come here and contest that on the merits. They're
24 making a decision not to come in here, okay. That is of
25 their own volition.

1 But, you know, to me, the Sae Young case actually
2 is on all fours here, Your Honor, because it clearly -- it
3 clearly held that the Court has the authority to enter an
4 assumption order and it's based on the Court's *in rem*
5 jurisdiction. I think the case is right on point because
6 there you had a nondebtor, and I believe the nondebtor did
7 allege defaults, Your Honor, and also a lack of personal
8 jurisdiction, and yet, the Court expressly found that it had
9 *in rem* jurisdiction to rule on the assumption motion and that
10 was all that was needed.

11 THE COURT: But the Court in Sae Young
12 specifically said -- let me find my notes:

13 Number one: The debtor didn't seek to litigate
14 any disputes it may have with the state before the Bankruptcy
15 Court. Quote, Its rights and obligations under the lease
16 were not adjudicated, end quote.

17 There was no dispute. There was no judgment on
18 the merit of any dispute between the parties.

19 The findings here, were you -- are they not -- are
20 they not an adjudication of the disputes?

21 MR. ROSENBLATT: Well, Your Honor, I do believe in
22 Sae Young, though, that there -- that the nondebtor did
23 allege defaults, yet the Court --

24 THE COURT: Just in passing.

25 MR. ROSENBLATT: -- you know, yet the Court --

1 THE COURT: Just in passing, in the briefs.

2 MR. ROSENBLATT: Right. But, Your Honor, still,
3 the inherent nature of what the debtor, the relief they're
4 seeking is purely *in rem* relief because they're not imposing
5 any obligations on MLP. This is a dispute centered solely
6 around the parties' rights with respect to the debtors'
7 property.

8 If the debtors were coming in here and they were
9 saying: Your Honor, we want to assume this contract; we want
10 to amend it; we want to -- we're modifying this; we're
11 imposing obligations on MLP that don't otherwise exist, Your
12 Honor, that's when *in personam* jurisdiction is necessary.
13 That's a dispute that imposes obligations on a nondebtor
14 party.

15 This, however -- and, Your Honor, again, the
16 findings that the debtors are asking you to make regarding
17 default, that is a requirement under the statute, okay. That
18 essentially -- whether or not it's contested or not, in any
19 other 365 assumption motion, you're -- a Court is going to
20 have to make those same findings, whether it's contested or
21 not. A Court has to inherently find that there is no default
22 or if there is a default, that it's cured.

23 So, to me, Your Honor, the larger point is that if
24 MLP's argument has merit, then every assumption motion will
25 require a Court to find personal jurisdiction over the

1 nondebtor party. And, Your Honor, I do think that this has
2 broader implications, because I think it would create
3 practical barriers that would prevent, particularly, foreign
4 debtors from using Chapter 11.

5 And, Your Honor, I know that lawyers are quick to
6 throw out, you know, a slippery-slope argument. They like to
7 point out a parade of horrors that would occur from a --
8 not a legal position. But in this case, to me it's very
9 clear that their argument would strip away a debtor's
10 fundamental right under Section 365 and discourage foreign
11 debtors from using Chapter 11 in a way that was contemplated
12 by Congress; in fact, to me, it's inconsistent with Congress'
13 mandate.

14 You know, we cited in our joinder, Section 109 of
15 the Bankruptcy Code, which are the debtor eligibility
16 requirements and, you know, there really are none, Your
17 Honor. I think it's pretty clear that if Congress wanted to
18 restrict foreign debtors who logically have foreign creditors
19 and foreign contract counterparties, you know, from using
20 Chapter 11, then they would have said so.

21 But it makes no sense to me, you know, where
22 Congress allows foreign debtors to frequently avail
23 themselves of Chapter 11, but then to impose jurisdictional
24 limitations that essentially strip away their key rights and
25 protections. So, I don't think that that lines up.

1 Your Honor, the final --

2 THE COURT: You would agree with me -- you would
3 agree with me that I don't have the ability to affect
4 property, okay -- or I shouldn't -- let me not use the word
5 "affect." I need the assistance of foreign courts in order
6 to fully realize my orders over assets or people located in
7 foreign jurisdictions. That's why we have ancillary
8 proceedings that get opened and foreign courts recognize my
9 order. I just don't sit here as adjudicator of the entire
10 world.

11 Now, it gets cumbersome. Like you pointed out,
12 there's some difficulties in fully realizing the Code to its,
13 I guess, fullest potential. And that's why we've developed
14 cross-border procedures and laws to try to marry due process
15 issues with the Bankruptcy Code and the fact that we're in a
16 worldwide -- we handle worldwide cases.

17 MR. ROSENBLATT: Yeah, Your Honor, I think you've
18 gotten that exactly right. But to me, enforcement is much
19 different than the inherent power of the Court to enter the
20 order in a Chapter 11, which is all that's before the Court
21 today.

22 Enforcement is a different issue. Whether or not
23 the -- you know, the impact or import of your order,
24 assumption order in Chile is not before the Court. That is
25 an enforcement issue. That is an issue that parties will

1 have to hash out separately. We have no -- I don't want to
2 speculate what MLP will do, whether they will respect your --
3 you know, your order; obviously, thus far, they haven't
4 respected the Court's orders. They have violated the stay.

5 But to me, Your Honor, those are mutually
6 exclusive issues. The inapparent power of the Court to enter
7 an assumption order versus, you know, enforcement of that
8 order of ruling, and to me, that second issue, that latter
9 issue is not before the Court today.

10 Your Honor, the last thing I would say is that,
11 you know, to me, MLP's -- the rationale and the legal
12 position that they are taking, it could have serious
13 implications. Even just beyond contract assumption is almost
14 every court order impacts a creditor's rights, *vis-a-vis*, the
15 debtor and the debtors' property, including confirmation
16 orders.

17 I mean, as Mr. Barefoot said, like, what is the
18 Court to do? Do you have to go, you know, creditor by
19 creditor to determine if you have personal jurisdiction over
20 them to determine if you have the authority or power,
21 inherent power to even enter, like, a confirmation order?

22 I mean, I just think that there's a clear
23 distinction between purely *in rem* jurisdiction -- and to me,
24 assumption under 365 is a purely *in rem* action. It does not
25 rely in any way, shape, or form on *in personam* jurisdiction

1 or *quasi in rem* jurisdiction, which is why we didn't even
2 address those issues, Your Honor. It's a purely *in rem*
3 issue.

4 If the debtors were imposing obligations on MLP
5 that didn't exist, if the debtors were trying to amend the
6 contract, that would invoke or require *in personam*
7 jurisdiction.

8 Your Honor, I really, truly believe that despite
9 MLP trying to turn this into something it's not, this truly
10 is nothing more than a run-of-the-mill assumption motion. If
11 MLP believed that they had -- that there was a default and a
12 basis to oppose assumption, then they should have come in
13 here and contested assumption on the merits, Your Honor.

14 They chose not to do that. They're playing games
15 and their games -- but their gamesmanship doesn't change the
16 limited relief that the debtors are seeking or, more
17 importantly, the power of the Court to grant relief to the
18 debtors.

19 That's really all I have, Your Honor.

20 THE COURT: Okay. Thank you.

21 MR. ROSENBLATT: Thank you.

22 THE COURT: Okay. Anyone else?

23 MR. ABBOTT: Can --

24 THE COURT: Oh, Mr. Abbott?

25 MR. ABBOTT: Yes, Your Honor.

1 Derek Abbott, here on behalf of AES Andes and
2 Norgener Renovables.

3 Your Honor, I don't wish the burden the record. I
4 do think this matter is a little more basic than MLP would
5 have the Court believe and, obviously, a critical issue to
6 these debtors. But, again, I don't want to repeat what my
7 colleagues have said, and subject to Your Honor's questions,
8 that's all I have.

9 THE COURT: Okay. Thank you, Mr. Abbott. I have
10 no questions for you.

11 Mr. Resnick?

12 MR. RESNICK: Thank you, Your Honor.

13 This is Brian Resnick from Davis Polk for Cerberus
14 South American Investments, a senior lender to the debtors
15 and a party to the RSA.

16 Your Honor, we also filed a joinder and I just
17 wanted to express our support for everything that
18 Mr. Barefoot and Mr. Rosenblatt said, and other than that,
19 we'll (indiscernible) anything, in case there's a need for a
20 reply.

21 THE COURT: Okay. Thank you.

22 Mr. Alberts, did you want to add to the record?

23 MR. ALBERTS: Your Honor, we -- Sam Alberts on
24 behalf of the official committee of unsecured creditors -- we
25 had filed a pleading in support of the debtors' motion

1 appearing at 381.

2 We had assessed the contract. We thought that the
3 contract really is a valuable asset of the estate. I realize
4 that piece of it is not before the Court, and so we will --
5 you know, we've rested on that pleading, itself.

6 THE COURT: Okay. I certainly understand the
7 committee's position with respect to the contract.

8 Okay. Well, Mr. Bromley, I think we have
9 exhausted everyone that is in support of the debtors'
10 position, so why don't I hear from you on the matter.

11 MR. BROMLEY: Thank you very much, Your Honor.

12 James Bromley on behalf of Minera Los Pelambres,
13 appearing in a limited fashion as set forth in our papers.

14 Your Honor, this is not a complicated issue. The
15 U.S. Constitution simply does not allow Your Honor to enter
16 the relief requested. Your subject-matter jurisdiction under
17 28 U.S.C. 1334 certainly extends to property of the estate,
18 but 1334 does not exempt the bankruptcy court or the
19 bankruptcy process from the due process clause of the
20 Constitution or from personal jurisdictional requirements.

21 It does not mean that the Court can grant any
22 relief under the Bankruptcy Code relating to property of the
23 estate without considering the due process rights of affected
24 parties.

25 I agree that there's a unique aspect to this, that

1 these arguments are not made frequently. And the reason
2 they're not made frequently is that most debtors do not try
3 to do what this debtor is trying to do.

4 We should start with the motion the debtors have
5 filed to assume the power purchase agreement. Your Honor, it
6 is almost exactly the situation that the Second Circuit
7 addressed in Orion. Remember, in Orion, the debtors filed
8 two motions or two things. They filed a motion to assume and
9 an adversary proceeding looking for declaratory relief and
10 certain findings, with respect to the contract.

11 The Court, in Orion, the Bankruptcy Court, Judge
12 Lifland said, I'm going to deal with it all in connection
13 with the motion and I'm going to say that the adversary
14 proceeding is moot.

15 That is what the debtors have done here, Your
16 Honor. They have loaded all the relief into a motion to
17 assume. This is not a motion to assume under Section 365
18 that simply seeks a finding that it's in the debtors' best
19 interests to assume the contract.

20 What the debtors are seeking are specific findings
21 under Chilean law, under the contract, with respect to my
22 client and my client's rights. That is a choice that the
23 debtors have made.

24 That is not the facts that were before the Court
25 in the Sae Young decision and, in fact, they are the facts

1 that were before the Court in the Orion decision. What we
2 have here, Your Honor, is a fundamental request to effect the
3 particularized rights of my client under a contract -- it is
4 a contract, no question -- that the debtors are parties to.

5 And I'm not going to get into the questions of
6 whether or not a foreign debtor should be filing a case in
7 Delaware; that's not before the Court.

8 But what we're dealing with is the idea that this
9 contract is a Chilean contract. It is cited in Chile. It is
10 written in Spanish. It is governed by Chilean law. It has a
11 Chilean arbitration provision in it that requires that
12 Chilean arbitrators, three of them, be appointed.

13 Your Honor, everything about this, it is between a
14 hydroelectric power plant located in Chile and a copper mine
15 located in Chile, everything about this, Your Honor, is
16 Chilean.

17 And the debtors consciously decided to file a
18 motion under 365 and not an adversary proceeding. We have
19 already talked in prior hearings about the problems that that
20 provided, right. We did not -- this should be, in our view,
21 and we continue to have our view and respectfully disagree
22 with Your Honor, that this should have been brought as an
23 adversary proceeding. If it had been brought as an adversary
24 proceeding, we think it should have been served, pursuant to
25 appropriate rules. And, indeed, if we had accepted service

1 under Federal Rules of Civil Procedure, we would have had 60
2 days to respond.

3 But, no, we are proceeding as if this is a motion.
4 We believe, Your Honor, that what is happening and the
5 specific relief that the debtors are seeking is relief that
6 is beyond simply stating that the debtors' business judgment
7 is appropriate in these circumstances.

8 The Court is asked to specifically find and
9 conclude that the commencement of the Chapter 11 cases does
10 not constitute an insolvency event under the agreement. If
11 you read the agreement, Your Honor, "insolvency event" is a
12 defined term.

13 If you read the letters that were exchanged
14 between myself and Mr. Barefoot and between my client and his
15 client, you will see that the question that is central to the
16 dispute among the parties is whether the commencement of the
17 Chapter 11 proceedings, these Chapter 11 proceedings
18 constituted an insolvency event under the power purchase
19 agreement.

20 The debtors also seek a finding from this Court
21 that the commencement of the Chapter 11 proceedings does not
22 constitute an act of bad faith for purposes of the agreement.
23 Where does the bad faith come from?

24 Well, Your Honor, we have stated in our
25 correspondence, whether it was between Sullivan & Cromwell

1 and Cleary Gottlieb or my client and Alto Maipo or the
2 lenders, that the actions to file this Chapter 11 proceeding
3 constituted bad faith under Chilean law. That's where the
4 bad faith comes in.

5 So, what the debtors are asking Your Honor to do
6 is to make a finding outside of the four corners of the
7 agreement that Chilean law, generally, would not allow an
8 action for bad faith for purposes of the agreement.

9 Your Honor, these are litigation issues. These
10 are not issues relating to the determination of whether it's
11 in the best interests of the debtors' estate to assume this
12 agreement. So, Your Honor, the fundamental nature of the
13 relief being sought means that this is *in personam* relief.

14 And this is where Shaffer v Heitner comes in.
15 First of all, Shaffer, itself, says in Footnote 17, that it's
16 using the term "*in rem*" to mean both "*quasi in rem*" and "*in*
17 *rem*." So, the Ninth Circuit is just flat wrong that Shaffer
18 v Heitner did not deal with -- that it was only related to
19 *quasi in rem*; the Supreme Court, itself, stated that it was
20 using the term "*in rem*" to capture both in Footnote 17.

21 In addition, Your Honor, there are two other
22 Circuits, the Second and the Fourth, which both find that
23 Shaffer v Heitner extends to both, "*in rem*" and "*quasi in*
24 *rem*" as the Supreme Court said in Footnote 17 of the
25 decision. But we don't even need to get to Shaffer v

1 Heitner, because the nature of the relief that's being sought
2 is *in personam* relief. It is also *in personam* relief with
3 respect to the motion to enforce the automatic stay.

4 THE COURT: So, let me ask you the question I've
5 asked everyone: What is your definition of *in personam*
6 relief?

7 Because the definitions that I've received so far
8 is, essentially, I have to -- being put in a position to ask
9 or, I guess, impose affirmative relief against your client
10 and I think you disagree with that definition. And that
11 really is the issue before me: How do you determine whether
12 something is *in rem* -- is an *in rem* action versus an *in*
13 *personam* action?

14 MR. BROMLEY: Well, Your Honor, let's talk about
15 what *in rem* and *quasi in rem* means. So *in rem* means rights
16 with respect to the property *vis-à-vis* the whole world, and
17 *quasi in rem* means rights with respect to the property *vis-à-*
18 *vis* a particular party.

19 Now what we are talking about here, though, is not
20 simply *quasi in rem* or *in rem*, we are looking at litigating
21 the particularized rights of my client. So the use of the
22 term "affirmative" relief I'm not sure exactly what my
23 colleagues mean by "affirmative."

24 They are asking the court to make a determination
25 that their point of view, in terms of the interpretation of

1 contract, is correct and my client's view is incorrect. They
2 are seeking to have you litigate this contract and whether or
3 not there's a breach, whether or not there is a right to
4 terminate. They want you to litigate that issue in your
5 court, Your Honor. That, I think, is fundamentally *in*
6 *personam* relief.

7 If I was driving a car in New York and I had an
8 accident with a resident of California that's the classic
9 question of whether or not it could be paled into a court in
10 California or whether I should be subject to suit in New
11 York.

12 We are talking about there is not a single
13 instance that can be shown here that indicates that these
14 parties had any expectation to be litigating disputes
15 relating to this contract in any form other than the Chilean
16 arbitration. And all the debtors have done -- and with all
17 due respect, Your Honor, this is the truth; all they have
18 done is put a deposit in a couple of professionals' accounts
19 and created an LLC on the eve of filing, and they claim that
20 they can magically transform, through 1334, every single
21 issue that relates to my client's contract into a matter that
22 you have the right to determine definitively as a matter of
23 your subject matter jurisdiction under 1334.

24 We simply do not believe that the United States
25 Constitution allows that to occur. We don't think that this

1 is outrageous. We don't think that this is outlandish. We
2 don't think it's perfidious. We think it is a fundamental
3 baseline rule with respect to all litigation in the United
4 States.

5 To the extent that there is any risk that is
6 presented here, for all of the non-US entities that are
7 accessing the United States and the Chapter 11 process to
8 reorganize their debts, it would bear everyone -- everyone
9 should bear in mind that those cases are here in effect
10 because the counter-parties allow them to be.

11 The financial services industries, the parties
12 that are investors on a worldwide basis are more than
13 comfortable then having US courts litigating issues. They
14 consent to the jurisdiction of the court. And in the vast
15 majority I would argue almost, if not all, cases up to this
16 point have not sought to use the US courts to violate the
17 local law of rights of individuals who are not subject to
18 personal jurisdiction of the US courts. That is why this is
19 a unique case. It is unique because no debtor has ever tried
20 to cross that line before. This debtor is trying to cross
21 that line with my client.

22 They knew about this issue from day one. They
23 could have filed an adversary proceeding on day one, they did
24 not. They have sought to shoehorn this through Section 365
25 and ask for affirmative relief that is only available through

1 an adversary proceeding. They have not tried to serve my
2 client under Rule 4. They have not -- and now they want Your
3 Honor to enter an order that violates my client's due process
4 rights and, frankly, this is the sort of due process issue
5 that will not stop here. I am not saying this from a threat
6 perspective.

7 The questions is what will we do. Well we will
8 appeal. We will appeal and we will go -- and I think this is
9 an issue that would be very appealing, so to speak, pardon
10 the pun, all the way up the chain. And we --

11 THE COURT: That certainly is an interesting issue
12 that we have all grappled with; although, all the parties are
13 saying it's simple, it's clear that it is not simple.

14 MR. BROMLEY: I very much agree, Your Honor. From
15 a jurisdictional perspective, right, the framework that the
16 US bankruptcy code, and the history of the bankruptcy laws of
17 the United States, and the bankruptcy clause provide are very
18 interesting.

19 All these eleventh amendment cases and, frankly,
20 most of the framework of the conversations that we had today
21 are premised on the idea that 99.9 percent of the day to day
22 work that we do in US bankruptcy courts deals with
23 individuals and corporations who are subject to or
24 voluntarily submit themselves to the jurisdiction of the US
25 court.

1 This is a situation where there is a company that
2 has -- my client, which has no context with the United
3 States, against whom the debtor is seeking affirmative
4 relief, that is contrary to our point of view with respect to
5 Chilean law generally and with respect to the language of the
6 power purchase agreement.

7 THE COURT: Mr. Bromley, would you agree with me,
8 and your briefing seems to imply, that if this was a
9 straightforward motion to assume in which I am, essentially,
10 substituting my -- I'm testing the sufficiency of the
11 debtor's business judgment in assuming the contract. Would
12 you agree with me that that is *in rem*?

13 MR. BROMLEY: Well, Your Honor, I would say no.

14 THE COURT: Okay.

15 MR. BROMLEY: I would also state for this
16 particular case the train has left the station. In this case
17 the debtor has already asked for specific relief. We can't
18 back the car out of the car wash, so to speak. The relief is
19 out there. If the debtor revised its relief and said I
20 simply want you to tell me you -- simply want Your Honor to
21 determine that there was a -- that it's an appropriate
22 exercise of the debtor's business judgment I don't think Your
23 Honor can do that because you already know that there are
24 disputes.

25 I do think that if -- in this circumstance, Your

1 Honor, if the debtors had simply filed a motion and said we
2 want to say this is an exercise of our business judgment we
3 had already written letters to the debtors before they filed
4 this motion to tell them that we believed that there were
5 issues under the agreement that breaches and rights of
6 termination existed.

7 If they had filed that motion, I would be
8 speculating, but I think we would have taken up, again, with
9 respect to a letter to say you have an obligation to inform
10 the court that there is an active dispute with respect to the
11 agreement and because you're asking the court to make an
12 affirmative finding that there are no breaches and no issues.

13 So, Your Honor, quite honestly, you know, I don't
14 think we have those facts. We couldn't have those facts. We
15 had disputed the contract issues before the debtors filed the
16 motion. That is why they incorporated it into the motion.
17 The debtors at this point have -- the court knows there is an
18 active dispute. I don't think that Your Honor can enter an
19 order at this point saying that there is no breach and that
20 it's simply an appropriate exercise of the debtor's business
21 judgment.

22 THE COURT: Okay. Thank you.

23 I interrupted you so I will allow you to continue.

24 MR. BROMLEY: Well, Your Honor, to continue, and I
25 don't want to -- I know we have covered a lot of ground here

1 in the colloquy. I think I have addressed the point where we
2 believe that Orion is on all fours with this case. We don't
3 believe that Sae Young applies for the reasons both that Your
4 Honor said as well as, you know, another express statement in
5 the decision where the court says, well, you know, I'm not
6 making any decisions here and if they want to go out and try
7 to enforce this and have to deal with a breach of contract
8 action down the road so be it.

9 I think it's also important in Sae Young to
10 recognize that it is yet another eleventh amendment decision.
11 You read Sae Young, you read Hood, and you read Katz the one
12 thing that is implicit in each of those cases is that there
13 is no underlying *in personam* jurisdictional question. The
14 question is whether the eleventh amendment's statement of
15 sovereign immunity means that the state, itself, or the
16 agency of the state is immune from the jurisdiction of the
17 court.

18 Each one of the 50 states is resident within the
19 50 states. So each one of them, but for the existence of the
20 eleventh amendment, clearly would be subject to the person
21 jurisdiction of the bankruptcy court. So there is no
22 discussion in any of those cases, as you wouldn't expect it
23 to be, because it's not as if it's a foreign state; it's a
24 domestic state.

25 THE COURT: I mean those cases are helpful in

1 determining what would be an *in rem* proceeding. The court is
2 struggling with what the scope of an *in rem* proceeding would
3 be in bankruptcy *vis-à-vis* the state because if it's *in rem*
4 then you can proceed against -- the court can exercise or
5 enter orders that would affect the state in that instance.

6 MR. BROMLEY: Correct, Your Honor. Look, our
7 argument is pretty simple. It boils down to the fact that
8 the characterization of the relief is what controls in terms
9 of determining whether or not *in personam* jurisdiction is
10 required. We recognize the court's subject matter
11 jurisdiction under 1334, but the inquiry, while necessary,
12 does not end there. There has to be a question as to what
13 kind of relief is being sought in both with respect to the
14 assumption motion and the enforcement of the stay the debtors
15 are seeking particularized relief, individualized affirmative
16 relief against my client.

17 THE COURT: Are we on the motion to the stay
18 because if we are I have questions on that.

19 MR. BROMLEY: I am on that, Your Honor.

20 THE COURT: Okay. I know, Mr. Barefoot, you didn't
21 really touch upon that so you are welcome to elaborate on the
22 reply, but let's talk about the motion to stay because I
23 think the relief sought with respect to the motion to say is,
24 of course, narrowly tailored.

25 So focusing on that relief don't the debtors just

1 want me to, essentially, put the agreement back in the nature
2 -- basically put the agreement back to where it was before
3 you allegedly took whatever actions you purportedly took. So
4 it's just a declaration that the actions that were taken, if
5 true, are *void ab initio*. So how is that affirmative relief
6 against your -- if that is, in fact, the test for *in personam*
7 or I should say only the test for *in personam*.

8 I agree with you that affirmative relief would, of
9 course, be *in personam*, but I think there's other areas where
10 affirmative relief may not be sought that could still be *in*
11 *personam*. How is that *in personam*, I guess, the relief being
12 sought?

13 MR. BROMLEY: So, Your Honor, it folds back into
14 the analysis that relates to the assumption agreement.
15 Without arguing the merits of whether or not there was a
16 violation of the stay. The allegations that are made focus
17 on letters that my client sent in Chile to Chilean parties
18 that make statements of their point of view with respect to
19 their interpretation of the power purchase agreement full
20 stop.

21 That power purchase agreement, as I said, is
22 entirely a Chilean agreement cited in Chile among Chilean
23 parties; all of that. Even the backup agreement with the
24 lenders is a Chilean law governed agreement. So there is
25 nothing that is US about that issue.

1 THE COURT: Well the agreement is property of the
2 estate.

3 MR. BROMLEY: The agreement is property of the
4 estate, but not the agreement with the lenders. There are
5 two agreements, right. There is an agreement with the
6 lenders between my client and the lenders that is not
7 property of the estate, and there is an agreement between my
8 client, Alto Maipo, that is property of the estate.

9 Without delineating and arguing the merits the
10 debtors do not dig into that. They allege that in the
11 statements that have been made with respect to the agreement
12 with the banks, not property of the estate, is somehow a
13 violation of the automatic stay. That clearly is not. It
14 doesn't relate to property of the estate in the least.

15 Your Honor, what the debtors have done to try to
16 alleviate concerns is to say that we're not seeking
17 sanctions, we're not seeking affirmative relief in their
18 view. Well that is the equivalent of saying that I am suing
19 a doctor for malpractice and I would like a finding of
20 liability, but I am going to hold off on seeking damages.
21 You can't go part way here.

22 The fact -- the idea that they're not seeking the
23 imposition of sanctions against my client, which I think
24 undoubtedly is affirmative relief, is undercut by the idea
25 that as soon as they get the "relief" that they're looking

1 for they will have in their back pocket an adjudicated
2 decision that the automatic stay has been violated and they
3 will come back to Your Honor looking for the imposition of
4 actual sanctions or damages.

5 THE COURT: Well isn't it how it would work in
6 practice that they would actually go to Chile and seek
7 recognition of my order, okay, as a defensive mechanism
8 perhaps if you were not to perform under the contract or
9 otherwise.

10 MR. BROMLEY: I don't know what a finding of a
11 statement that says that the debtors -- that MLP has violated
12 the automatic stay would have in Chile unless attached to it
13 with some instruction from this court that there is an impact
14 on MLP as a result of it.

15 THE COURT: Well the actions -- the relief is that
16 you violated the stay and your actions are *void ab initio*.

17 MR. BROMLEY: Well that is the affirmative relief.
18 I mean the *void ab initio* is affirmative relief.

19 THE COURT: Hold on. Is it affirmative relief
20 against your client?

21 MR. BROMLEY: It is saying that the letters that
22 my client has sent stating out legal positions have no legal
23 effect.

24 THE COURT: You would agree that the agreement is
25 *res*, correct, of the estate?

1 MR. BROMLEY: Correct.

2 THE COURT: Okay. Why would the relief effect
3 your client -- yes, it effects your client, of course, right,
4 because you took certain actions and they would be declared
5 *void ab initio* but wouldn't the -- wouldn't it really be an
6 effort to return the *res* to what it was before you took the
7 actions which would be *in rem* or would it be *in personam*
8 because your rights and obligations in the agreement are
9 somehow effected.

10 MR. BROMLEY: I think, Your Honor, rights with
11 respect to the agreement are effected by that sort of a
12 determination. And without -- I mean this is the slippery
13 slope with respect to jurisdiction, Your Honor, right. We
14 are not arguing the merits of whether or not there has been a
15 stay violation. The question of whether or not there was
16 goes to the issue that you are raising as to whether or not
17 there is any status quo to revert to.

18 We don't believe that there has been any change in
19 the status quo, but we are not going to argue that today,
20 Your Honor, because there is no personal jurisdiction with
21 respect to my client on that issue.

22 THE COURT: I understand. You can't argue it or
23 you would be submitting to my jurisdiction.

24 MR. BROMLEY: Exactly, Your Honor.

25 THE COURT: Absolutely. If its *rem*, *in rem*, you

1 get the choice about whether you want to come in and argue
2 it, but I don't need you here, correct?

3 MR. BROMLEY: Your Honor, I mean true. Quite
4 honestly the point that Mr. Rosenblatt made so eloquently is
5 that it's the choice of parties to come into court and submit
6 to the jurisdiction. Well, you know, that is true; it is the
7 choice. Our client -- my client has chosen not to submit to
8 the court's jurisdiction and will stand on that right. We
9 believe it is unconstitutional to adjudicate either of the
10 motions as it violates the due process clause because we are
11 not subject to the court's jurisdiction.

12 THE COURT: Okay. I appreciate that. Thank you.
13 Well, Mr. Barefoot, why don't I --

14 MR. BAREFOOT: Your Honor, may I be heard briefly
15 in reply?

16 THE COURT: Of course. I will turn the podium --
17 I was just about to turn the podium back over to you. I
18 would say to the extent others want to be heard as well I am
19 happy to hear from them, but I want to hear from you first.

20 MR. BAREFOOT: Thank you, Your Honor, and I
21 apologize for the interruption.

22 THE COURT: That's okay. I've been interrupting
23 you all morning.

24 MR. BAREFOOT: Not at all, Your Honor. As the
25 court stated, Your Honor, there were very clear suggestions

1 in the Sae Young decision that just as MLP did here the
2 state, which asserted that it was not subject to personal
3 jurisdiction, eluded in passing to asserted defaults under
4 the lease, but opted not to raise that issue on the merits
5 before the court; probably for the same reasons that MLP
6 doesn't want to because it doesn't want to subject itself to
7 the court's jurisdiction.

8 The court in Sae Young held that that was not a
9 bar to entry of the order. And if Your Honor had any
10 discomfort or qualms about the scope of the proposed order
11 that we asserted we would respectfully suggest, Your Honor,
12 that we can address that just as the Sae Young Westmont Court
13 did by tailoring, in a more narrow fashion, the findings that
14 we would be asking the court to make.

15 THE COURT: Well I thought that through too. So
16 let's just say hypothetically you remove the finding that
17 there is a default. So, essentially, I am in a position that
18 has been described in a few courts that I am just looking at
19 the debtor's business judgment in assuming the agreement, but
20 I still have a 365(b) problem because you cannot assume an
21 agreement unless you cure it or you provide prompt assurance
22 of a cure.

23 So assuming, assuming for the sake of argument,
24 that you're wrong and that you did, in fact, breach the
25 agreement how do I find what the cure would be because that

1 means to actually be a finding, correct?

2 MR. BAREFOOT: I believe that is correct, Your
3 Honor. That is why we briefed the issue because we did
4 believe that this is a requirement under 365(b).

5 Let me draw Your Honor to an alternative finding
6 that we did include in the proposed form of order which is
7 that the insolvency clause is an unenforceable *ipso facto*
8 clause and that as such it need not be cured. I don't think
9 there is serious room for debate that the insolvency clause,
10 which MLP asserts, was triggered based on the commencement
11 and continuation of these Chapter 11 proceedings would be an
12 *ipso facto* clause that, at least, as a matter of US
13 bankruptcy law would not be enforceable and would not be
14 required to be cured under 365.

15 THE COURT: So why does that take this matter from
16 a potential *in personam* action if I were to agree with Mr.
17 Bromley's client to an *in rem* action?

18 MR. BAREFOOT: Because, Your Honor, that is not
19 adjudicating any rights that MLP has under Chilean law. That
20 is adjudicating whether a cure is required as a matter of the
21 prerequisites to assumption that are set out in the code.
22 It's not determining whether there was a default under
23 Chilean law, its only determining that as a matter of US
24 bankruptcy law this is not a default that is required to be
25 cured.

1 THE COURT: So in other words --

2 MR. BAREFOOT: And I don't think there has been --

3 THE COURT: -- assuming that there is a default
4 you don't need to cure it because it cannot be enforced.

5 MR. BAREFOOT: That is correct, Your Honor. That
6 just flows from the text of 365(b)(2) which provides,
7 effectively, a carve-out from the (b)(1) cure requirement and
8 says that Paragraph 1, which is the cure requirement, does
9 not apply to a default that is a breach of a provision
10 relating to the commencement of a case under this title, the
11 insolvency or financial condition of the debtor, etc.

12 I think that given that MLP's allegations, you
13 know, they haven't been briefed, but you have seen them in
14 the latter correspondence that we have submitted to the
15 court. They all turn on the insolvency clause being
16 triggered by the commencement of these Chapter 11 cases.

17 THE COURT: Okay.

18 MR. BAREFOOT: I think, Your Honor, that -- I also
19 just want to note, you know, I think there is a little bit of
20 a disingenuous in Mr. Bromley's position that was made clear
21 when Your Honor asked him, you know, the question about if
22 this were just limited to a finding about the debtor's
23 business judgment would that be an *in personam* question that
24 directly affected MLP. He said that it still would be.

25 I think there is really no legitimate argument

1 that if all the court is doing is authorizing the assumption
2 of the agreement based on its finding that based on the
3 evidence that we will present at, what Your Honor deems, the
4 appropriate time that we have satisfied the business judgment
5 standard. I think there is really no legitimate debate about
6 that evidence.

7 Your Honor, I just want to also briefly touch on
8 the questions that have been raised as to the prospects of
9 impact of realization or enforcement on the orders that Your
10 Honor enters. I think as Mr. Rosenblatt alluded to that
11 really is a question for another day and potentially for
12 another court.

13 The availability of the remedies that we're asking
14 for Your Honor should not turn on a separate showing of
15 exactly when and how those will be enforced in the future.
16 It would really be premature to speculate about that
17 question.

18 If I could just then briefly touch on the
19 automatic stay argument, Your Honor. I won't belabor the
20 point, but I think there really is no legitimate argument
21 that a notice to either terminate or unilaterally modify an
22 executory contract is a black letter violation of the
23 automatic stay. It is an interference with the debtors -- the
24 property of the debtor's estates, namely the debtor's
25 property rights under the agreement.

1 As Your Honor eluded to, effectively, undoing that
2 stay violation is in no way an adjudication of specific
3 rights or obligations as to the counterparty to that
4 agreement. It's simply the natural consequence of the
5 actions being taken in violation of the stay being void.

6 THE COURT: So it's your position that there was a
7 notice of termination?

8 MR. BAREFOOT: Your Honor, the letters, I think,
9 quite cleverly are a little ambiguous as to whether the
10 termination was being exercised, but to the extent that that
11 was the intent we would certainly say that that was an act in
12 violation of the stay that was *void ab initio*. At minimum
13 the letters are very clear that they are seeking to shorten
14 the debtors and unilaterally terminate the debtors cure
15 periods so as to commence the separate cure periods that
16 apply to the lenders. Even though that is short of
17 termination, a unilateral modification of an executory
18 contract is similarly a stay violation that should be *void ab*
19 *initio*.

20 THE COURT: Didn't I see a letter come across my
21 desk in which MLP stated that they are performing under the
22 contract subject to all reservations?

23 MR. BAREFOOT: Your Honor, that letter was
24 attached, you're correct, as an exhibit to the Herzog
25 declaration that we filed with our reply brief. The letter

1 says that -- you're correct, that they are not waiving any
2 rights or remedies that they have, but that solely for the
3 time being they will -- I think that the language that they
4 used was nominate the power that they are obligated to
5 purchase under the agreement for the time being.

6 I don't think in any way, though, that --
7 Mr. Bromley can correct me if this was his intent that that
8 letter is intended to retract or modify the positions in the
9 prior letters that we would assert constitutes stay
10 violations.

11 THE COURT: What does it mean to nominate the
12 power?

13 MR. BAREFOOT: Your Honor, this may be going into
14 a technical realm that I am not perfectly qualified in, but
15 there is a mechanism under the contract wherein MLP has to
16 indicate that it, effectively, will purchase a certain
17 quantity of power. Because the -- as you have heard in
18 various other proceedings by way of update the project is now
19 commercially operational which triggered a request from Alto
20 Maipo, the debtors, to effectively have MLP agree as to the
21 quantity of power that it's going to take from the off put of
22 the plant.

23 So I think the letter is saying that they will
24 fulfill for the time being those technical requirements and
25 will take the power, but I don't think in any way that that

1 letter, given its express reservation of rights, was undoing,
2 in particular, the unilateral shortening of the debtor's cure
3 periods that was set forth in prior correspondence.

4 THE COURT: Okay. I appreciate that explanation.
5 Thank you.

6 MR. BAREFOOT: So I will turn the podium to
7 Mr. Rosenblatt, or Mr. Resnick, or Mr. Abbott if they had
8 anything further unless Your Honor has questions.

9 THE COURT: I don't think I have any questions at
10 this time. Thank you.

11 Mr. Rosenblatt.

12 MR. ROSENBLATT: Yes. Thank you, Your Honor.
13 It's Andrew Rosenblatt, again, from Norton Rose Fulbright.

14 Literally just one minute, Your Honor. I just
15 want to say that I think that, you know, mere findings that
16 are incidental to adjudicating parties rights in the debtor's
17 property does not transform an *in rem* action into an *in*
18 *personam* action. The findings are not the relief that the
19 debtors are seeking. The relief here that the debtors are
20 seeking is contract assumption, Your Honor, which is a core
21 proceeding which unquestionably this court has the authority
22 to enter under its *in rem* jurisdiction.

23 Your Honor, I promise this is the last time I will
24 refer to the Sae Young case, but I do think that there is a
25 good quote which we had cited in our brief which addresses

1 this issue and, Your Honor, it's at 276 B.R. 898 where the
2 court finds reasons as follows. It says pursuant to 28
3 U.S.C. 1334(e) District Courts, hence bankruptcy judges, have
4 exclusive jurisdiction over a debtor's estate which consists
5 of all legal or equitable interest the debtor has wherever
6 located and by whomever held; thus, the bankruptcy judge has
7 such authority over a debtor's property no matter where the
8 property is located.

9 The jurisdiction over a debtor's estate is *in rem*
10 jurisdiction which involves determining the status of
11 property and, therefore, the rights of persons with respect
12 to that property. In contrast, *in personam* jurisdiction
13 seeks to impose an obligation on a person.

14 Your Honor, I agree with Mr. Bromley. The key
15 here is really the nature of the relief that the debtors are
16 seeking. Despite the findings that they have requested,
17 which, again, as Mr. Barefoot eluded to can easily be scaled
18 back the findings are not the relief that the debtor is
19 seeking here.

20 They are merely seeking to have this court
21 authorize them to assume a contract which is property of the
22 estate which this court clearly has *in rem* jurisdiction over,
23 Your Honor. Again, I don't think that findings that are
24 incidental to a property dispute transforms a clear *in rem*
25 action into an *in personam* action.

1 Thank you, Your Honor.

2 THE COURT: Thank you.

3 MR. BROMLEY: Your Honor, may I -- oh, I'm sorry,
4 I don't know if Mr. Resnick has something to say.

5 THE COURT: Let me hear from (indiscernible)
6 parties and then Mr. Bromley, you can get a chance to
7 address --

8 MR. RESNICK: Nothing further at this time. Thank
9 you.

10 THE COURT: Okay. Mr. Abbott.

11 MR. ABBOTT: Nor from I, Your Honor. I think you
12 have had, as my grandfather used to say, a sufficiency here.

13 THE COURT: Okay. I'd like to meet your
14 grandfather.

15 Mr. Bromley.

16 MR. BROMLEY: Your Honor, I apologize for that
17 interruption. Very briefly.

18 First, to deal with Mr. Rosenblatt's comments I
19 couldn't disagree with him more as he just read the order and
20 the relief sought in the motion.

21 With respect to Mr. Barefoot's points I think the
22 most telling comment with respect to the stay violation issue
23 was the phrase to the extent that was the intent. There is
24 no evidence before Your Honor right now. We are not going to
25 submit an argument on the merits until a determination is

1 made as to whether or not there is personal jurisdiction.
2 There is nothing before the court that would allow Your Honor
3 to rule on the stay motion at the moment.

4 In the event that Your Honor determines that there
5 is personal jurisdiction we reserved our rights as to
6 whatever relief, whether modified or status quo, that the
7 debtors decide to continue to seek.

8 Thank you, Your Honor.

9 THE COURT: All right. Thank you.

10 Well this is very informative. I am going to take
11 a break and I need to think over a few points that were
12 raised by the parties today. Why don't we come back at four
13 o'clock and I will let you know what my decision is on these
14 two matters.

15 My understand is that --

16 MR. BAREFOOT: Your Honor, will we use the same
17 zoom? Just logistically the same zoom or do we need to
18 register for a new matter?

19 THE COURT: You can use the same zoom.

20 Are those the only two -- are these the only two
21 matters that are going forward today?

22 MR. BAREFOOT: They are, Your Honor.

23 THE COURT: Okay. So we will adjourn and I will
24 see you all at four o'clock. Thank you very much.

25 (Recess taken at 12:13 p.m.)

1 (Proceedings resumed at 4:01 p.m.)

2 THE COURT: Good afternoon, everyone. This is
3 Judge Owens.

4 Thank you for giving me a couple hours to get my
5 thoughts together following the conclusion of oral argument.
6 We're gathered together for my oral ruling in the Alto Maipo
7 case.

8 So the question before the court is whether it
9 may, without first determining whether it has personal
10 jurisdiction over MLP, adjudicate the debtor's motion to
11 assume the power purchase agreement between Alto Maipo and
12 MLP, and the debtor's motion for entry of an order enforcing
13 the automatic stay and declaring *void ab initio* certain
14 purported actions take to date by MLP with respect to that
15 agreement. This is the third hearing on the matter.

16 At the first hearing it was made clear that the
17 debtors did not serve the motions on MLP pursuant to
18 Rules 9014(b) and 7004 which require them to serve the
19 motions as they would at complaint and summons. Given MLP's
20 status as a foreign entity service would require compliance
21 with Rule 4(f).

22 While MLP argued that I could not, therefore,
23 schedule a hearing on the motions I disagreed given MLP's
24 actual notice of the motions and my ability to craft an
25 appropriate schedule to give MLP the opportunity to present

1 the relevant jurisdictional arguments that they would raise
2 if the motions were properly served under the applicable
3 bankruptcy and federal rules. I ultimately scheduled the
4 motions for a hearing today to determine, as a threshold
5 matter, the issue currently before the court.

6 The debtors and their supporters do not wish to
7 spend the time and resources in engaging in discovery and a
8 contested hearing to establish personal jurisdiction over
9 MLP. Rather, they assert I may enter the orders because I
10 have *in rem* jurisdiction over both the agreement as property
11 of the estate and because the motion to assume that agreement
12 is an *in rem* action. MLP vigorously opposes the debtors
13 approach directing this courts -- disputing this court's
14 jurisdiction over it and my ability to adjudicate the motions
15 without first establishing personal jurisdiction over it.

16 I agree with MLP and will not adjudicate the
17 assumption motion without an adversary proceeding, proper
18 service and an establishment of personal jurisdiction over
19 MLP. In order to determine the questions before me I must
20 take critical stock of the relief sought.

21 MLP is correct that the debtor's assumption motion
22 seeks more than a determination of the debtor's business
23 judgment in seeking to assume the agreement. It seeks
24 findings that, among other things, there are no existing
25 defaults and, thus, no required cure under the agreement in

1 order to comply with Section 365(b) .

2 To provide an evidentiary basis for such findings
3 the debtors attached declarations and those declarations make
4 it clear from the outset that there was a pending dispute
5 amongst MLP and the debtors over a potential default. The
6 letters attached to the stay motion confirm such a dispute.

7 Making the requesting findings regarding default
8 and cure requires a determination of the party's contractual
9 rights and responsibilities in the agreement and would
10 constitute an *in personam* action. A breach of contract
11 action is a common example of an *in personam* action and,
12 effectively, the findings sought here would require the same
13 determination whether a breach of contract occurred and the
14 appropriate remedy, if any.

15 The action is not one that is traditionally *in rem*
16 requiring or involving a determination of the claims and
17 rights of MLP and the debtors to the agreement. The debtor's
18 suggestion that --

19 (Audio interruption)

20 THE COURT: The debtor's suggestion that they
21 remove most of the at issue findings and leave only the
22 question of whether a particular clause of the agreement
23 amounts to an unenforceable *ipso facto* clause does not change
24 the *in personam* nature of the action. The court would still
25 be adjudicating and effecting MLP's rights in the agreement

1 rather than determining interest of the parties to the
2 estates *res*.

3 Accordingly, the due process clause precludes me
4 from adjudicating those issues and making the debtors
5 requested findings in the absence of personal jurisdiction
6 over MLP. There is no dispute that I have *in rem*
7 jurisdiction over the agreement. Moreover, case law,
8 including the Sae Young case relied upon the by debtors and
9 others supportive of the debtors, suggests that a straight-
10 forward adjudication of only a debtor's business judgment in
11 seeking to assume the agreement would be an *in rem*
12 proceeding, but those conclusions do not modify or transform
13 the *in personam* nature of the related default and cure
14 disputes into an *in rem* action or permit me to adjudicate the
15 *in rem* action under the umbrella of an *in rem* proceeding
16 without establishing personal jurisdiction over MLP.

17 While the court's jurisdiction is premised on the
18 debtor and its estate the Supreme Court has acknowledged in
19 Katz and Hood that the bankruptcy court's exercise of *in rem*
20 jurisdiction can involve ancillary *in personam* actions that
21 could exceed a court's authority. That is what we would have
22 here if we move forward as the debtor's request.

23 Another hurdle presented by the inclusion of the
24 debtor's requested findings in the proposed order is the
25 Second Circuit's decision in Orion which is not binding on me

1 but is persuasive in this instance. That decision makes it
2 clear that the types of determinations requested by the
3 debtors in this proceeding by way of their assumption motion
4 require an adversary proceeding.

5 As the court explained, at the heart a motion to
6 assume should be considered a summary proceeding intended to
7 efficiently review the debtors or trustee's decision to
8 adhere to or reject a particular contract in the course of
9 swift administration of the bankruptcy estate. It is not the
10 time or place for prolonged discovery or lengthy trial with
11 disputed issues. In concluding that an adversary proceeding
12 is required for the adjudication of contract issues that
13 arise as part of the motion to assume the court highlighted
14 that proceeding in such a fashion eliminates the possibility
15 that constitutional problems will arise.

16 While I could find no case directly on point
17 addressing today's issues in the context of a foreign
18 creditor there are plenty of case examples included within
19 this jurisdiction in which bankruptcy courts have required
20 adversary proceedings to be commenced and heard concurrently
21 with assumption or rejection motions, or significant contract
22 disputes exist between parties over whom the court already
23 has personal jurisdiction.

24 Often parties seeking answers to contract disputes
25 voluntarily commence an adversary alongside a 365 motion or

1 simply file an adversary proceeding in anticipation of such a
2 motion. In Orion an adversary proceeding was deemed
3 necessary to protect the counterparty's jury rights. Here,
4 of course, the need for an adversary and attendant procedural
5 safeguards arises from, among other things, the personal
6 jurisdiction issues asserted by MLP.

7 In sum, if the debtors want the findings they must
8 commence an adversary proceeding, properly serve the
9 complaint and summons as well as the assumption motion to the
10 extent proper service has not yet been effectuated so that
11 the court's adjudicatory authority can be established and
12 MLP's due process rights can be upheld.

13 The set of circumstances in which we find
14 ourselves and which serves to support my decisions today are
15 extraordinary. Here, there is an acknowledged contract
16 dispute between the debtors and MLP. In the face of that
17 dispute the debtors sought assumption of the agreement as
18 well as adjudication of the contract disputes without an
19 adversary proceeding or proper service on MLP.

20 MLP does not consent to the procedure or my
21 exercise of personal jurisdiction and the debtors do not wish
22 to engage in a contested hearing to establish personal
23 jurisdiction over MLP at this time, nor have they sought
24 recognition proceedings in Chile. While the debtors argue
25 that my ruling today fundamentally will alter cases in this

1 district going forward these unique circumstances are not
2 present in 99.999 percent of the cases before me. I do not
3 anticipate them arising again any time in the near future;
4 moreover, regardless of the effects I simply am not empowered
5 to do what the debtors want me to do.

6 Finally, for the sake of completeness, I want to
7 acknowledge that we have come full circle on the issues
8 unsuccessfully presented by MLP at our first hearing. Now,
9 however, I have the benefit of full briefing and argument,
10 and I am in a position to hold that proceeding forward on the
11 merits of the assumption motion cannot occur as requested by
12 the debtors for the reasons explained. Moreover, to avoid
13 further briefing on the issue I am also prepared to find that
14 MLP has not submitted to the jurisdiction of the court
15 through their briefing and arguments to date.

16 Turning to the stay motion the stay motion seeks a
17 determination that MLP's actions to date and any future
18 actions purportedly terminating or modifying contract terms
19 violate the stay and are *void ab initio*. Given the narrow
20 form of relief sought I do believe that the action is *in rem*.
21 It is, essentially, a proceeding to return property of the
22 estate, the agreement, to the form it was before MLP took the
23 purported actions.

24 Affirmative relief is not sought against MLP and I
25 am not being asked to determine whether MLP was entitled to

1 take the purported actions pursuant to its rights under the
2 agreement. Rather, the question is whether its actions, *vis-*
3 *à-vis* the agreement, property of the estate, the estates *res*
4 violated the automatic stay and are thus *void ab initio*.
5 This is an *in rem* action.

6 Accordingly, I will hear the merits of the motion.
7 In fairness to MLP it should be given the opportunity to make
8 a merits based argument, should it wish, and, therefore, I
9 think that the motion should be scheduled for hearing on
10 May 13th with an appropriate objection deadline for MLP of
11 4:00 p.m. on May 6th. I am not requiring MLP to submit to
12 the jurisdiction of the court, I'm just giving it the
13 opportunity and time.

14 So for those reasons we will not be going forward
15 on the merits of both motions today. I will so order the
16 record unless the parties think that my conclusions today
17 should be submitted in an order. I am happy to direct the
18 parties to meet and confer and submit that order under
19 certification of counsel.

20 Are there any questions?

21 MR. BAREFOOT: No, Your Honor.

22 THE COURT: Okay. I'm not hearing any. To the
23 extent that you would like an order memorializing the go-
24 forward process, like I said, please meet and confer with
25 Mr. Bromley. You are welcome to try to memorialize that in a

1 form of order submitted under certification of counsel.

2 I think that is all we had for today. I look
3 forward to seeing you all on Friday. With that I will
4 consider today's hearing adjourned. Thank you all very much
5 for your arguments and your presentations in connection with
6 this matter.

7 (Proceedings concluded at 4:12 p.m.)

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CERTIFICATION

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability.

/s/ William J. Garling

April 26, 2022

William J. Garling, CET-543

Certified Court Transcriptionist

For Reliable

/s/ Mary Zajackowski

April 26, 2022

Mary Zajackowski, CET-531

Certified Court Transcriptionist

For Reliable